the minor children. In any event an agreement should not be considered as a final settlement of the rights of minor children not parties to the arrangement and to which they are incapable of assenting.[27]

ITHAMAR D. WEED

INSURANCE

AUTOMOBILE INDEMNITY — GUEST STATUTE

The plaintiff while riding as a guest of one Hickok in Michigan was injured in an automobile accident. She brought action against Hickok in Ohio. The jury found that the accident was the result of the wilful and wanton misconduct of the insured, thus taking the case out of the operation of the Michigan guest statute (Sec. 4648 Compiled Laws of Michigan (1929) — relieving the owner or operator of liability except in cases of gross negligence or wilful and wanton misconduct), and gave her judgment. Hickok carried liability insurance with the Yorkshire Indemnity Company of New York and the plaintiff then filed against it to recover on the previous judgment. A general demurrer was entered by the company on the ground that the policy covered only accidental injuries. From a judgment sustaining the demurrer, the plaintiff appealed. In reversing the judgment, the court held that the injuries resulting from the wilful and wanton misconduct of the insured were accidental within the meaning of the policy. *Herrell* v. *Hickok,* 57 Ohio App. 213, 13 N. E. (2nd) 358 (1937). The Supreme Court affirmed the Appellate Court finding that if the Michigan law was as alleged in the petition, then, under the law of that state, the injuries were accidentally sustained. The court said it was unnecessary to decide whether injuries caused by wilful or wanton misconduct would be covered by the policy in a case arising in Ohio. *Herrell* v. *Hickok,* 133 Ohio St. 66, 11 N.E. (2nd) 869 (1937).

In the absence of statute the general rule is that an owner or operator

[27] The Committee on Judicial Administration and Legal Reform of the Ohio State Bar Association has accepted the draft of the Marriage and Divorce Commission appointed by Gov. White, which will probably be submitted to the General Assembly in the near future. This statute will eliminate the problems discussed in this note. The proposed divorce law provides that in an action for divorce, alimony, or annulment the court shall have the power to raise, lower, or otherwise modify an award of alimony for future support of the spouse if payable in installments, or an award for support money to minor children either in installments or in a lump sum, whether or not the award was based upon a contract between the parties. An award to the spouse of a lump sum to be paid in installments is not subject to modification when such sum is a final property settlement. The court will also have the power to equitably adjust arrears of such alimony or payment to minor children which may have accumulated by reason of the inability of the party to meet such payments. Proposed Divorce Law, sec. 8b, 11 Ohio Bar 275 (July 18, 1938).

of an automobile owes his guest the duty of reasonable care. *Sparrow* v. *Levine*, 19 Ohio App. 94 (1923); *Marple* v. *Haddad*, 103 W. Va. 508, 138 S.E. 113, 61 A.L.R. 1248 (1927).

Many states now have guest statutes relieving the owner or operator of liability to guests except in certain cases, such as those arising out of gross negligence, wilful and wanton misconduct, or intoxication. Under Ohio's guest statute, G.C. Sec. 6308-6, the guest can recover only for wilful and wanton misconduct on the part of the owner or operator.

That guest statutes have been beneficial to the liability insurance companies is obvious. Only to a guest who can ground his claim on an exception in the statute, viz., wilful and wanton misconduct, can an insurance company be held liable, and even then the terminology of the statute may be such as to encourage the insurer to resist the claim on the ground that the policy does not cover the risk.

In the case of *American Casualty Co.* v. *Brinsky*, 51 Ohio App. 298, 2 Ohio Op. 146, 200 N.E. 654 (1934), a guest, after recovering against a car owner by basing his claim on the exception in the Ohio guest statute, was denied recovery from the insurance company. Although the trial court had found the operator guilty of "wilful and wanton misconduct," the Court of Appeals separated the phrase and limited itself to the finding that the insurance company was not liable for the insured's *wilful* acts. Thus the question of whether the insurance company would be liable in a case where there was only wanton misconduct was left open. But when this question arose in the appellate case of *Rothman* v. *Metropolitan Casualty Ins. Co.*, 23 Ohio Law Abs. 2 (1936), it was held that the insurance policy did not cover wanton misconduct, and recovery was denied the guest. The court, relying upon the language of *Universal Pipe Co.* v. *Bassett*, 130 Ohio St. 567, 5 Ohio Op. 214, 200 N.E. 843 (1936), became confused and held that "wilfulness" and "wantonness," in effect, were similar. Tying that up with the holding of the *Brinsky Case, supra*, the Appellate Court arrived at its surprising conclusion.

That the Appellate Court in the *Rothman Case* was not on firm ground is evident from the fact that Ohio, in other cases, has recognized a distinction between the terms "wilful misconduct" and "wanton misconduct." In the former it is said that the actor intends the result of his act while in the latter the actor although having knowledge of the greater probability of harm from his act, disregards the consequences. Both involve a higher degree of culpability than that negligence which is the failure to meet the standard of care required in the usual tort case. *Reserve Trucking Co.* v. *Fairchild*, 128 Ohio St. 519, 191 N.E. 745

(1934); and see *Universal Pipe Co.* v. *Bassett, supra,* at p. 575. In view of the above, it was not surprising that the Supreme Court to which the *Rothman Case* was appealed reversed the Appellate Court. *Rothman* v. *Metropolitan Casualty Ins. Co.,* 134 Ohio St. 241, — N.E. — (1938). The Court found that "wanton misconduct" was not intentional conduct and that an injury growing out of "wanton misconduct" was accidental within the meaning of the insurance policy. In dictum the Court remarked, "No one would claim that such policy covers an injury resulting from a wilful act of the insured, for the term 'wilful act' implies an intention to cause injury," and cited *Commonwealth Casualty Co.* v. *Headers,* 118 Ohio St. 429, 161 N.E. 278 (1928).

The dictum must at least be comforting to the Appellate Court which decided the *Brinsky* case for it was on the *Headers* case that it largely relied. In the *Headers* case it was held that a personal assault by a taxi-cab driver on another was not an accident because intentional, and was not covered by the liability policy held by the taxi-cab company. The weight of authority is clearly opposed to the case, holding, that where, under an accident insurance policy, the insured is injured as a result of an intentional act of another without misconduct of the insured and the injury is unforeseen by the insured, the injury is accidental. *Richards* v. *Travelers' Ins. Co.,* 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 452 (1891); *Buckley* v. *Massachusetts Bonding and Ins. Co.,* 113 Wash. 13, 192 Pac. 924 (1920); *Interstate Business Men's Accident Association* v. *Ford,* 161 Ky. 163, 170 S.W. 525 (1914); *General Accident, Fire and Life Assurance Corp.* v. *Hymes,* 77 Okla. 20, 185 Pac. 1085, 8 A.L.R. 318 (1919). The criterion is well stated by Judge Cardozo in *Messersmith* v. *American Fidelity Co.,* 232 N.Y. 161, 133 N.E. 432, 19 A.L.R. 876 (1921), where he said, "Injuries are accidental or the opposite, for the purpose of indemnity, according to the quality of the results rather than the quality of the causes."

Those policies insuring against accidental injuries should not be confused with those insuring against injuries due to accidental means. In the latter the insurer is not liable when the acts were intended although the results were not expected. *Ramsay* v. *Fidelity and Casualty Co.,* 143 Tenn. 42, 223 S.W. 841, 13 A.L.R. 651 (1920); *Standard Life and Accident Ins. Co.* v. *Schmaltz,* 66 Ark. 588, 53 S.W. 49, 74 Am. St. Rep. 112 (1899); *Olinsky* v. *Railway Mail Ass'n.,* 182 Cal. 669, 189 Pac. 835, 14 A.L.R. 784 (1920).

There has been a scarcity of cases on the problem of whether an automobile liability or indemnity policy covers accidents caused by gross negligence, wilful or wanton misconduct. Two English cases have held

that the injuries are accidental when resulting from gross negligence. *Tinline* v. *White Cross Ins. Ass'n.*, 3 K.B. 327, 11 B.R.C. 260 (1921) and *James* v. *British General Ins. Co.*, 2 K.B. 311 (1927); but see *O'Hearn* v. *Yorkshire Ins. Co.*, 51 Ont. L.R. 130, 67 D.L.R. 735 (1921). *Ohio Casualty Ins. Co.* v. *Welfare Finance Co.*, 75 Fed. (2nd) 58 (1934) (writ of certiorari denied in 295 U.S. 734, 79 L. Ed. 1682, 55 S. Ct. 645 (1935), held, in a suit by the insured, that wanton injuries were included within the meaning of accidental injuries.

The Illinois court, in construing the phrase "wilful and wanton misconduct," as used in the Illinois guest statute, has found it to mean such absence of care as indicates a conscious indifference to the consequences. *Farley* v. *Mitchell*, 282 Ill. App. 555 (1935); *Murphy* v. *King*, 284 Ill. App. 74, 1 N.E. (2nd) 268 (1936). Michigan courts have described it as a reckless disregard for the consequences. *Manser* v. *Eder*, 263 Mich. 107, 248 N.W. 566 (1933); *McLone* v. *Bean*, 263 Mich. 113, 248 N.W. 566 (1933); *Goss* v. *Overton*, 266 Mich. 62, 253 N.W. 217 (1934). In Michigan, "wilful and wanton misconduct" and "gross negligence" have been viewed as corresponding terms but they have been regarded as being more than negligence of any kind, the law imputing " . . . intention to harm where there is a reckless disregard for the safety of others." *Boyle* v. *Mosely*, 258 Mich. 347 (1932) at p. 350. See also *Finkler* v. *Zimmer*, 258 Mich. 336, 241 N.W. 851 (1932). If "wilful and wanton misconduct" is used in the sense of "gross negligence" then the insurer should be liable for injury caused in this manner, for "gross negligence" has been construed as want of slight care and such want of care as to indicate consciousness of the probable consequences and an indifference to them. (Sherman and Redfield on the Law of Negligence 6th Ed. (1913), Secs. 49, 748). And, while the Michigan court under the guest statute has refused to use the term "gross negligence," its definition of "wilful and wanton misconduct" is virtually the same. See *Manser* v. *Elder*, *supra*; *McLone* v. *Bean*, *supra*; and *Goss* v. *Overton*, *supra*. See also the Illinois cases *Farley* v. *Mitchell*, *supra*; and *Murphy* v. *King*, *supra*.

The majority of courts, however, do not regard "gross negligence" and "wilful and wanton misconduct" as being synonymous. *Rioko* v. *Aijala*, 199 N.E. 484 (Mass.) (1936); *Desroches* v. *Holland*, 189 N.E. 619 (Mass.) (1934); *Southern Railway Co.* v. *Kelley*, 52 Ga. App. 137, 182 S.E. 631 (1935). A.L.I. on Torts, Sec. 500, states that the courts often call reckless misconduct "wanton or wilful misconduct," and at p. 1296 the following statement is made: "The difference between reckless misconduct and conduct involving only such a

quantum of risk as is necessary to make it negligent is a difference in the degree of risk, but *this difference is so marked* (Italics added) as to amount substantially to a difference in kind."

But, even if courts generally are unwilling to accept the view of the Michigan and Illinois courts as a rational basis upon which to found liability upon an insurance policy, there is another satisfactory approach to the problem. Although "wilful misconduct" theoretically denotes intent, nevertheless, a great many courts fail to limit it to such narrow confines. "Failure to use ordinary care to avoid danger after knowledge . . . . " of another's danger, "reckless disregard of consequences after discovering danger," and driving a train when approaching a crossing at a reckless speed as "habitually done," have been said to fall within the meaning of the term. *Loveless* v. *Kirk*, 34 Ohio L. R. 175 (App.) (1930); *Payne* v. *Vance*, 103 Ohio St. 59, 133 N.E. 85 (1921); *Hill* v. *Atlanta Charlotte Air Line Ry. Co.*, 172 S.C. 408, 174 S.E. 233. "Wilful misconduct" as used by the courts often refers to the intending of the act and not to the intending of the consequences. *Cook* v. *Big Muddy Carterville Mining Co.*, 249 Ill. 41, 94 N.E. 90 (1911); *Pacific Coast Casualty Co.* v. *Pillsbury*, 31 Cal. App. 701, 162 Pac. 1040 (1916). The latter case, where an errand boy in violation of express instructions and warnings attempted to run an elevator and was killed, furnishes a striking example of this. Obviously, there is a vast difference between intending the act and actually intending or expecting the harm which results from it. It would be fantastic to believe that the driver of the car in the principal case actually intended the accident and the resulting injuries to the plaintiff, especially in view of the probability of being injured himself. And, as pointed out above, a majority of the courts are of the opinion that if only the act is intended and the consequences were neither foreseen nor intended, the injury is accidental.

In summary, it may be said that the Supreme Court of Ohio in the *Rothman Case, supra,* has established the rule that injuries growing out of "wanton misconduct" are accidental within the meaning of a liability insurance policy. In dictum it has expressed the view that a liability policy insuring against "accidental injuries" would not protect a guest where the insured's act was wilful. This is in line with the Court of Appeals in the *Brinsky Case, supra.* But this point still awaits actual decision by the Supreme Court. Clearly, in a case where "wilful misconduct" is used to mean intending the consequences of the act, no fault can be found with a holding that the injuries were not accidental. However, the phrase "wilful misconduct" is a tool which the judicial

carpenters have used for various purposes. When it is employed to describe only the intending of the act and not the intending of the resulting injury, there is good authority for labeling the product "accidental injury."

EUGENE STEEL

LANDLORD AND TENANT

REDUCTION OF RENT — CONSIDERATION — ABATEMENT AFTER FIRE

The plaintiff lessee entered into a written lease with defendant lessor for a term of 20 years from August, 1928. The lease reserved an annual rental of $10,000 a year, payable in nine monthly installments starting on August 15 of each year. Plaintiff alleged that on November 16, 1934, the lease was modified in writing by the parties so that the rent reserved was reduced to the sum of $7,200 for the year beginning August 15, 1934. In May of 1935 a fire destroyed the premises. In November, 1935, the defendant lessor, having become bankrupt, listed a claim against plaintiff lessee for rent remaining unpaid at the time of the fire on the basis of the rent of $10,000 originally reserved in the lease. Plaintiff lessee set out the written agreement of November, 1934, reducing the rent to $7,200. Defendant lessor pleaded lack of consideration for the rent reduction. Judgment for the plaintiff lessee was affirmed by the Court of Appeals. This court held that the inability of the lessee to pay the higher rent, his imminent insolvency, and the desire of the landlord to retain the lessee as a tenant, constituted a valid consideration for the reduction in rent, and the lessor could not repudiate the contract. *Adams Recreation Palace, Inc.* v. *Griffith, Trustee*, 58 Ohio App. 216, 12 O. Op. 134, 16 N.E. (2d) 489 (1938).

In contract law the rule that payment of part of a debt is not satisfaction of the whole has long been considered elementary.[1] But like many harsh rules of law, this rule has been so amended by exceptions, both by statute and judicial decision, as to partially or wholly nullify its effect. So any consideration, however small and insignificant, has been held to satisfy the rule. Thus a subsequent agreement to pay part of a debt in satisfaction of the whole is supported by sufficient consideration if the debtor becomes bound to do anything he was not legally bound to do by the first agreement. Payment at a different time, in a different place, or in another manner other than was contemplated in the original agreement have all been held to constitute sufficient consideration to

[1] WILLISTON, CONTRACTS, sec. 120.